

A NEW PROCEDURAL MEAN TO UNIFY THE JUDICIAL PRACTICE

Iulia BOGHIRNEA*

ABSTRACT:

THE NEW CODES OF CIVIL AND CRIMINAL PROCEDURE HAVE ESTABLISHED A NEW PROCEDURAL MECHANISM FOR THE UNIFICATION OF THE UNITARY JUDICIAL PRACTICE, TOGETHER WITH THE REFERRAL IN THE INTERESTS OF THE LAW, NAMELY THE NOTIFICATION OF THE HIGH COURT OF CASSATION AND JUSTICE REGARDING A PRIOR DECISION FOR SOLVING A POINT OF LAW. IN THIS PAPER WE AIM TO ANALYZE THE ADMISSIBILITY CONDITIONS FOR THE ACT OF APPREHENSION, THE OWNERS OF THE ACT, THE TRIAL PROCEDURE, THE EFFECTS AND CONTENT OF THE DECISION.

KEY WORDS: ORDERING A PRIOR DECISION SOLVING A POINT OF LAW, NON-UNITARY JUDICIAL PRACTICE, HIGH COURT OF CASSATION AND JUSTICE.

INTRODUCTION

1. RELEVANT PROVISIONS AND THE IMPORTANCE OF THE REGULATION

Art 126 Para 3 of the revised Romanian Constitution states that “*the High Court of Cassation and Justice shall provide a unitary interpretation and implementation of the law by the other courts of law, according to its competence*”.

Beside the referral in the interests of the law (Art 514-518 of the Civil Procedure Code), a new instrument insuring the unification of the judicial practice, which has been adopted by the new codes of procedure, is the preliminary ruling, which the High Court of Cassation and Justice shall order solving certain points of law, on whose explanations it depends the solution of a litigation by a judicial court.

A similar procedure – “*saisine pour avis de la Cour de Cassation*” – exists in the French legal system, stated by Art 1031-1 and next of the French Civil Procedure Code for the implementation of Art 441-1 and next of the new French Code of Judicial Organization. Also, in the European Union’s system of law there is a procedure regarding the preliminary question addressed to the Court of Justice seated in Luxembourg, stated by Art 267 of the Treaty on the Functioning of the European Union, the “preliminary ruling”, similar in many aspects with this new internal mechanism¹

* Postdoctoral scholar “Acad. Andrei Rădulescu” Legal Research Institute of Romanian Academy

* Lecturer PhD, Faculty of Law and Administrative Sciences, University of Pitesti.

¹ G. Boroi și alții, *Noul cod de procedură civilă, Comentariu pe articole, 1st Volume Art 1-526*, (Bucharest: Hamangiu Publ.-house, 2013), 1007

Thus, Art 97 Point 3 of the Civil Procedure Code states that the “*High Court of Cassation and Justice rules: [...] the requests regarding a preliminary ruling for solving certain points of law*”.

In civil matters, the legal framework is represented by Art 519-521 of the 2nd Book – “The contentious procedure”, Title III – “Provisions regarding the insurance of a unitary practice”, chapter II – “Requests submitted to the High Court of Cassation and Justice for ordering a preliminary ruling solving certain points of law”, and by Art 516 Para 6-9, Art 517 Para 3 and Art 518, which become regulation norms because the legislator refers to these provisions stated by Chapter I “Referral in the interests of the law” of the Civil Procedure Code¹.

In criminal matters, this legal institution is stated by Art 475-4771 of Title III – “The trial”, Chapter 5 – “Provisions insuring an unitary judicial practice”, Section 2 – “Notification of the High Court of Cassation and Justice requesting a preliminary ruling in certain points of law” and by Art 473 Para 5-8, Art 474 and 4741, which become regulation norms because the legislator refers to them in Section 1 titled “Referral in the interests of the law” of the Criminal Procedure Code².

According to Art 19 Para 2¹ of the republished Law No 304/2004 on judicial organization, with subsequent modifications and amendments, among the High Court of Cassation and Justice functions [...] the United Divisions for judging referrals in the interests of the law [...].

The purpose of this procedure, stated by the Explanatory Memorandum to the draft of the New Civil Procedure Code, is “the creation of a new mechanism for the unification of the judicial practice which shall contribute, beside the referral in the interests of the law, to the transformation of the Romanian jurisprudence in a predictable one, which shall answer to all reasonable expectations of litigants and, also, lead to the shortening of the trial, preventing the completion of all means of appeal”³.

The doctrine states that the notification of the High Court of Cassation and Justice requesting a preliminary ruling for certain points of law represent “a mechanism created to prevent the emergence of a non-unitary practice in the application and interpretation of the law by the courts, mechanism whose implementation is welcomed in the context of the European Commission’s recommendations in this area”⁴.

2. THE MOVING PARTIES AND THE CONDITIONS FOR ELIGIBILITY FOR THE INITIATION OF THE PROCEDURE TO MOVE THE COURT FOR A PRELIMINARY RULING

The analysis of Art 519 reveals that the High Court of Cassation and Justice can be notified only by the judges, members of different panels of judges from courts, courts of appeal or from the High Court of Cassation and Justice.

¹ Law No 134/2010 on the Civil Procedure Code, republished, with subsequent modifications and amendments, published in the Official Gazette of Romania, Part I, No 545/3 August 2012

² Law No 135/2010 on the Criminal Procedure Code, republished, with subsequent modifications and amendments, published in the Official Gazette of Romania, Part I, No 486/15 July 2010

³ Explanatory Memorandum to the draft of the New Civil Procedure Code, as it has been sent to the Parliament, http://www.just.ro/Sections/PrimaPagina_MeniuDreapta/ProiectulnouluiCoddeProcedur%C4%83Civil%C4%83/tabid/648/Default.aspx

⁴ Boroi, *Noul cod de procedură civilă...*, 1007

The parties in a trial may emphasize the existence of a point of law to the court competent to solve their litigation, but the “findings” of its existence belongs only to this court⁵.

Art 519 of the Civil Procedure Code states the cumulative fulfilment of the following requirements on which it depends the act of apprehension, namely:

- a.) The existence of a case file in course of trial;
- b.) The panel of judges, notifying the High Court of Cassation and Justice, is invested with the ultimate resolution of the case; the case, in course of trial, must be in the legal competence of the tribunal, court of appeal or of the High Court of Cassation and Justice;
- c.) The act of apprehension must be related to only one point of law, which requires a principle solution by clarifying the meaning of a legal norm, which is susceptible of various interpretations.

The act of apprehension of the Supreme Court of Justice shall be inadmissible if it shall refer to *a matter of fact* of a certain case, namely it shall be required the opinion on the merits of the case⁶.

- d.) The matter of law is new, namely upon it the High Court of Cassation and Justice did not stated yet, nor is the object of a pending referral in the interests of the law.

In literature it is considered that the matter of law, if the High Court of Cassation and Justice “ruled a sufficient number of decisions as to shape a constant jurisprudence” can no longer be considered a novelty, nor that upon it the High Court of Cassation and Justice did not stated⁷.

- e.) The awarding of a solution on the main issue of the matter on trial shall depend on the matter of law which must be clarified.

3. THE COURT RULING NOTIFYING THE HIGH COURT OF CASSATION AND JUSTICE

The court ruling is the document by which certain courts, invested with the competence to solve the case as final court, *only after contradictory debates*, shall be able to request, to the High Court of Cassation and Justice to rule a decision, solving a question of material/substantial national law, on whose clarification rests the settlement of the case.

The existence of *contradictory debates* on a matter of law, during the trial, creates the opinion of the court that the judicial norm applicable for this case may have different interpretations.

The panel shall decide, by a court ruling, the notification of the High Court of Cassation and Justice, if it ascertains that all conditions for admissibility stated by Art 519 of the Civil Procedure Code are fulfilled.

Therefore, the court ruling is the judicial act that triggers the procedure in front of the High Court of Cassation and Justice, which must have certain elements useful for a pertinent interpretation, namely: the reasons supporting the admissibility of the act of apprehension, the panel’s point of view and the point of view of the parties of that litigation.

Thus, the court ruling is not subjected to any appeal (Art 520 Para 1) even more so because the legislator considered the fact that the parties of a trial would have no interest in

⁵ I. Deleanu, *Noul cod de procedură civilă, Comentarii pe articole, 1st Volume*, (Bucharest: Universul Juridic Publ.-house, 2013), 706

⁶ Boroi , *Noul cod de procedură civilă...*, 1008. See in this regard also the Guide for submitting a prior act of apprehension, available at http://www.scj.ro/s_complet%20chestiuni.asp

⁷ Boroi , *Noul cod de procedură civilă...*, 1010

opposing the solution of the matter of law on which it rests the fair and legal resolution of their case⁸.

The closing court proceedings suspend the case trial until the preliminary ruling for solving a point of law.

We are talking here about a mandatory suspension because if the trial would continue it is possible to reach a different interpretation of the matter of law, on whose clarification rests the solving of the case, than the one offered by the Supreme Court, whose decision is mandatory for the court of referral.

Art 520 Para 3 of the Civil Procedure Code states that the court ruling shall be published on the website of the High Court of Cassation and Justice, after registering the pending litigation.

The reason for which is brought to the public knowledge the court ruling of the Supreme Court is that courts with pending litigations to be able to suspend them (the suspension, in this case, being optional) until the solution of the notification, as stated by Art 519 Para 4, though Art 520 Para 3 states that the decision solving a question of law is mandatory for the other courts from the moment of its publishing in the Official Gazette of Romania, Part I.

It must be emphasized the fact that between the two moments of solving the notification, until which the other courts shall suspend the litigation, and that of the publishing of the ruling is a period of 45 days.

Until the fulfilment of the desideratum of a unitary and coherent judicial practice for all courts, so that it will insure for the justice seeker predictability over the justice act, we consider that courts with similar cases pending, to have the obligation to suspend them until the requested resolution of the High Court of Cassation and Justice.

4. TRIAL PROCEDURE IN THE HIGH COURT OF CASSATION AND JUSTICE

The procedure is free of the legal stamp duty and of the judicial stamp in order to be accessible.

The distribution of the act of apprehension is made by the president or, in his absence by one of the vice-presidents of the High Court of Cassation and Justice or by the person appointed by them (Art 520 Para 5 of the Civil Procedure Code).

The formation of the panel of judges of the High Court of Cassation and Justice, according to Art 520 Para 6-9 of the Civil Procedure Code, shall be established depending on the point of law representing the object of the act of apprehension.

Thus, the act of apprehension shall be trialed by a panel formed by the president of the correspondent section of the High Court of Cassation and Justice or by a judge appointed by him, any by 12 judges from that section. The section's president or, in case of impossibility, the judge appointed by him is the panel's president and shall adopt the necessary measures for the random selection of judges.

After the formation of the panel, its president shall appoint a judge to draft a report on the point of law subjected to ruling.

When the point of law refers to the activity of several sections of the High Court of Cassation and Justice or if there is no section correspondent to the one that ascertained that the point of law has not been unitary solved by the practice, its president, or in his absence, one of the High Court of Cassation and Justice's vice-presidents shall submit the act of apprehension to the presidents of the sections interested in solving the point of law.

⁸ Deleanu, *Noul cod de procedură civilă...*, 709.

In this case, the panel shall be formed by the president, or in his absence, by the vice-president of the High Court of Cassation and Justice, who shall chair the panel, of the presidents of the sections interested in solving the point of law, as well as by 5 judges from those sections, randomly appointed by the panel's president.

After appointing the panel, for the elaboration of the report the panel's president shall appoint a judge from each section. The rapporteurs are not incompatible.

For the elaboration of the report, the panel's president shall request the written opinion of some known experts regarding the matters of law which can generate different interpretations in courts.

The report shall provide the arguments on which it is grounded, the relevant jurisprudence of the Constitutional Court, of the European Court of Human Rights or of the Court of Justice of the European Union, if necessary, the doctrine in this area, as well as the opinion of the consulted experts.

The report shall be communicated to the parties, who, within maximum 15 days may submit in written, by their lawyer, or their legal counsel, their points of view regarding the matter of law subjected to clarification.

It must be shown that, according to Art 520 Para 1, the parties would have told their point of view regarding the matter of law, which must be recorded in the court ruling, and Para 10 of the same article states that the legislator must ask, once again, but only to the parties, to express their point of view, with the option to submit it or not. We consider that, in this case, it is about an incomplete expression of the legislator, who probably aimed to ask the parties for a point of view regarding the "*matter of law subjected to trial*" as it results from the report drafted by the rapporteur judge, the text should have been continued.

The panel meeting is summoned by its president with at least 20 days before. With the summoning each judge shall receive a copy of the report and of the proposed solution.

At the meeting shall participate all judges of the panel and the solution is adopted by at least two thirds of the number of judges of the panel. Abstentions from voting shall not be accepted.

The meeting debating the act of apprehension is not public, namely without the summoning of the parties, but, as the Civil Procedure Code states, they have the possibility to submit their points of view, in written when they receive the report.

The act of apprehension shall be trialed within maximum 3 months since the investiture.

5. THE CONTENT AND EFFECTS OF THE PRELIMINARY RULING FOR SOLVING CERTAIN POINTS OF LAW

Art 521 Para 1 of the Civil Procedure Code states that the High Court of Cassation and Justice, by its Panel for solving certain points of law, shall rule on the act of apprehension by a *decision*.

Solving the points of law is mandatory for the court that requested it from the *ruling* of the decision, and for the other courts from its publication of the decision in the Official Gazette of Romania, Part 1 (Art 521 Para 3).

In literature is shown that the wording of the legislator is "uninspired" because the panel of judges who issued an act of apprehension for the High Court of Cassation and Justice is not present when adjudication, effectively knowing the content of the decision when is communicated⁹.

The decision is mandatory for the pending cases and for those submitted subsequent the preliminary ruling.

⁹ Deleanu, *Noul cod de procedură civilă...*, 711

Regarding the termination of the effects of the preliminary ruling, its applicability ends with the modification, repeal or when the legal provision subjected to interpretation was found unconstitutional, Art 518 of the Civil Procedure Code being applicable according to Art 521 Para 4.

In literature it is stated that the legislator has “ignored” the situation of falling into disuse of the decision and that of the decision’s resurgence. In the latter case, it shall be imposed due to the jurisprudence of the two European courts, which may adopt “norms mandatory” for the internal law¹⁰.

CONCLUSION

By this new procedural mechanism we consider that the High Court of Cassation and Justice may fulfil the role offered by the constitutional provisions “to provide a unitary interpretation and implementation of the law by the other courts of law, according to its competence” and “to satisfy the principles of law and to point the jurisprudence of the supreme court for the other courts of law”¹¹.

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¹⁰ Deleanu, *Noul cod de procedură civilă...*, 704

¹¹ N. Volonciu, *Tratat de procedură penală. Parte specială, 2nd Volume*, (Bucharest: Paideia Publ.-house, 1996), 375

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